Office-Supreme Court, U.S.
FILED
APR 20 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1180

In the Supreme Court of the United States

OCTOBER TERM, 1982

CARMEN DORANZO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

SARA CRISCITELLI
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether evidence seized from petitioner's office pursuant to a valid search warrant should have been suppressed because petitioner, who was encountered on the street leaving the vicinity by officers arriving to execute the search warrant, agreed to return to his office and unlock the door.

2. Whether the district court abused its discretion in admitting inculpatory hearsay declarations against penal interest made by two unavailable declarants, where corroborating circumstances indicated the trustworthiness of the statements.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Argument	2
Conclusion	9

TABLE OF AUTHORITIES

Cases:

Michigan v. *Summers*, 452 U.S. 692	3-4
United States v. *Alvarez*, 584 F.2d 694	7
United States v. *Garris*, 616 F.2d 626	7
United States v. *Palumbo*, 639 F.2d 123	7, 8
United States v. *Riley*, 657 F.2d 1377	7

Statute and rules:

26 U.S.C. 7201	2
Fed. R. Evid.:	
Rule 804	6
Rule 804(b)(3)	6, 7

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1180

CARMEN DORANZO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The judgment order of the court of appeals (Pet. App. A1-A2) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 15, 1982. The petition for a writ of certiorari was filed on January 14, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted on 11 counts charging tax evasion, in violation of 26 U.S.C. 7201. Petitioner was sentenced to three years' imprisonment on count one, to be followed by concurrent terms of three years' imprisonment on the remaining counts. Imposition of the latter term was suspended in favor of five years' probation. Petitioner was also fined $20,000. The court of appeals affirmed in an unpublished judgment order (Pet. App. A1-A2).

The evidence at trial, the sufficiency of which is not in dispute, established that petitioner operated an illegal gambling and bookmaking operation between December 1976 and May 1978. During that period petitioner failed to file required excise tax forms or otherwise to pay excise and special occupational taxes relating to his gambling business. The evidence further demonstrated that petitioner was aware of his obligation to file returns and pay his taxes, because the government had on several previous occasions assessed him for back taxes.

ARGUMENT

1. Petitioner first contends (Pet. 10-15) that he was improperly detained by police officers executing a search warrant on his gambling premises in December 1976. This claim is without merit.

In December 1976 Philadelphia police officers obtained a warrant to search petitioner's office. According to the testimony of one of the officers at the suppression hearing, when they arrived to execute the warrant they encountered petitioner walking out of an alley near the premises. They approached him,

identified themselves, and presented petitioner with a copy of the warrant. Petitioner then agreed to accompany the officers back to the building. The officers patted down petitioner to see if he was carrying any weapons; finding none, they proceeded to the building. Petitioner took keys from his pocket and opened the steel door, permitting officers to enter and conduct their search (Supp. H. Tr. 7-8, 11, 18). That search uncovered gambling paraphernalia hidden in the ceiling (*id.* at 23).

Petitioner sought to suppress the gambling paraphernalia, claiming, *inter alia*, that it was the fruit of an unlawful seizure of his person. Petitioner testified at the suppression hearing. He agreed that he met the police officers by the alleyway, but testified that he refused to accompany the officers back to the building. He further stated that the officers searched him and took his keys from him, and that, under restraint, he was "marched" back to the building and detained there while the officers, using the keys they had forcibly taken from him, entered and conducted the warrant search (Supp. H. Tr. 4, 22).

The district court denied petitioner's suppression motion. The court specifically credited the officer's testimony that petitioner was not coerced and that the officers did not forcibly take his keys from his person, in preference to petitioner's contrary testimony. The court also observed that petitioner had good reason to consent to return to his office with the officers and to open the door, so as to avoid damage to his property from the forcible entry that might otherwise have taken place (Pet. App. A7; Tr. 1.3).

Because petitioner was found to have accompanied the officers and opened the door voluntarily, this case provides no occasion for the Court to consider whether under the rule of *Michigan* v. *Summers*, 452

U.S. 692 (1981), the occupant of premises that are the subject of a search warrant may be seized off the premises, brought back to those premises and detained while the search is conducted. The district court's determination, upheld by the court of appeals, that petitioner was not coerced into accompanying the officers is fact-bound and does not warrant further review. Any detention of petitioner that took place during the search of his office itself is plainly authorized under *Michigan* v. *Summers*, *supra*.

We note, in any event, that petitioner has never explained how any illegality in his detention would taint the evidence discovered in the warrant search of his gambling office. Because the officers had a valid search warrant, they had the authority to enter the premises with or without petitioner's consent, and with or without his keys. Accordingly, the gambling paraphernalia discovered in the office during the warrant search were not fruit of any illegality in his detention.[1]

---

[1] Petitioner mentions in passing (Pet. 10 n.1) his contention that a second entry of his premises pursuant to warrant, in May 1978, was defective in some unspecified respect. Petitioner did not present this contention in the district court, which accordingly did not hear evidence respecting this incident and made no ruling on it. (In district court petitioner did contend that the May 1978 search warrants were issued in the absence of probable cause and that the supporting affidavit was insufficiently specific. Those claims were rejected by the district court (Pet. App. A7) and by the court of appeals (*id.* at A1).) The government argued in the court of appeals (Br. 14) that petitioner had failed to preserve his separate contention that the May 1978 warrant was improperly executed. The court of appeals did not expressly address that claim. Plainly that contention is not properly before this Court.

2. Petitioner contends as well (Pet. 15-21) that the district court erred in allowing government agents to testify as to out-of-court declarations against penal interest tending to inculpate petitioner, made to the agents by two participants in petitioner's gambling operation, each of whom became unavailable to testify at trial because he or she invoked the privilege against self-incrimination. This claim is also without merit.

The first declarant admitted to a government agent, posing as an associate of petitioner, that he was a "numbers writer" for petitioner and that he had recently made payments to petitioner in that capacity (Tr. 4.57-4.59). This admission was corroborated by the discovery of the declarant's name and telephone number in items seized in a search of petitioner's premises. Other evidence seized at that time independently implicated the declarant as a numbers writer (Tr. 4.61-4.62). Additionally, a check for $202.48, which the declarant said he sent to petitioner as payment for wagers, was found in petitioner's car trunk (Tr. 4.58) Finally, the declarant admitted making payments to petitioner at an address established by independent evidence to be the location of petitioner's bookmaking operation (*ibid.*).

The second unavailable declarant admitted to two government agents that she was a numbers writer. Although she denied knowing petitioner, she admitted that she had given two checks that were proven by independent evidence to have been connected to petitioner's gambling operation to a third person in connection with gambling. She also described two other checks that she accepted as settlement for bets; the checks were found in petitioner's suitcase during a warrant search (Tr. 4.75-4.80, 4.82).

After careful consideration of the circumstances surrounding the statements (see Tr. 2.181-2.185; 3.2-3.6; 3.170-3.204; 4.2-4.18) the district court found (Tr. 4.18-4.20) that each statement was against the declarant's penal interest and was sufficiently corroborated and accompanied by indicia of trustworthiness to be received in evidence pursuant to Fed. R. Evid. 804(b)(3).[2]

Admission of this hearsay evidence was proper. First, it is undisputed that the two declarants were "unavailable" (see Pet. 17). It is similarly beyond doubt that the declarants' admissions subjected them to criminal liability. Petitioner merely urges that they lacked supporting "indicia of reliability" or "guarantees of trustworthiness." The district court, however, found otherwise, and there is no occasion for further review of that fact-bound determination.

The first declarant's admissions, unwittingly made to a government agent, were corroborated by independent evidence linking him to petitioner and to petitioner's gambling premises. And the first declarant obviously had no reason to curry favor with government agents when he made his statement. The statement of the second defendant was also substantially

---

[2] Rule 804 provides in pertinent part:

> (b) *Hearsay exceptions.* The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> * * * * *
>
> (3) A statement which * * * at the time of its making * * * so far tended to subject him to * * * criminal liability * * * that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

corroborated. Thus, although she knew that her questioners were government agents, the statements bore sufficient indicia of reliability to overcome the possibility that she was motivated to "curry favor" with the authorities at petitioner's expense. Indeed, that possibility is excluded here because the second declarant denied knowing petitioner at all.

The district court regarded the declarants' statements to be adequately corroborated and accompanied by indicia of trustworthiness, and the court of appeals agreed. Accordingly, this case provides no occasion for consideration of an alleged intercircuit conflict concerning admission of inculpatory declarations against penal interest.[3] None of the

---

[3] The alleged conflict, which may be more semantic than real, arises because Rule 804(b)(3) explicitly requires a finding of corroborating circumstances indicating trustworthiness as a condition for admission of declarations against penal interest offered to *exculpate* the defendant, but imposes no such explicit requirement as to declarations whose effect is *inculpatory*, such as those admitted in evidence here. Several courts of appeals—apparently impelled by Confrontation Clause concerns—have nevertheless held corroboration and indicia of trustworthiness to be required for inculpatory statements as well. Compare *United States* v. *Riley*, 657 F.2d 1377 (8th Cir. 1981); *United States* v. *Palumbo*, 639 F.2d 123, 131 (3d Cir. 1981) (Adams, J., concurring); and *United States* v. *Alvarez*, 584 F.2d 694, 701 (5th Cir. 1978), with *United States* v. *Garris*, 616 F.2d 626, 629-633 (2d Cir. 1980). There is no occasion to consider any conflict here, for the district court found the declarants' statements to be corroborated and trustworthy. Moreover, as petitioner acknowledges (Pet. 18), the Third Circuit has adopted a relatively strict rule as to the admissibility of inculpatory declarations against penal interest. There is no indication that it did not employ that rule here. Accordingly, petitioner is not aggrieved by any difference among the courts of appeals respecting such statements.

cases cited by the petitioner requires exclusion in such circumstances.[4]

---

[4] In *United States* v. *Palumbo*, *supra*, the Third Circuit, examining the "totality of circumstances" of the case (639 F.2d at 127), found that the declarant's statements following discovery of cocaine on her person would not likely "tend[] to subject" her to additional criminal liability. Moreover, the court also found that the statement was made by the declarant while in police custody and thus could have been motivated by a desire to "curry favor with the authorities." *Id.* at 128.

A similar analysis was employed in *United States* v. *Riley*, *supra*. There the court of appeals found that although the out-of-court statement was technically against the declarant's penal interest, it subjected her to prosecution on a lesser offense than that in which the defendant was implicated. The court also found other circumstances present that suggested that the statement in question was not, on balance, contrary to the declarant's self-interest.

These cases, and others cited by petitioner (Pet. 19-20), merely illustrate the broad range of factors examined by courts in considering admissibility of inculpatory declarations against penal interest. None of these decisions, however, suggests that the statements at issue here were improperly received in evidence. Neither of the declarants was under arrest at the time he made his statement. While the second declarant, under questioning by the authorities, may have had reason to curry favor with them, she did not in fact specifically incriminate petitioner. The statements of each were well corroborated by other non-hearsay evidence, and there is no indication that either declaration was unreliable or untrustworthy.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

SARA CRISCITELLI
Attorney

APRIL 1983

☆ U. S. GOVERNMENT PRINTING OFFICE: 1983 404058 1332